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Raphael Pura v Insas Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–720 OF 1999
AHMAD FAIRUZ, DENIS ONG AND HAIDAR JJCA
20 OCTOBER 2000

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Civil Procedure *— Amendment — Defence — Delay — Exercise of discretion of the court — Lack of bona fide in application for amendment — Insufficient material and reasons to support amendment —þWhether amendment should be allowed*

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The appellant appealed against the order of the judge dismissing his application to amend his statement of defence. The appellant deposed in his affidavit in support of the application that the delay in his application was due, inter alia, to the need to make comparison and confirmation of copies of document to the original documents which were kept overseas. The respondent submitted that there was an inexcusable and inordinate delay on the part of the appellant in filing the application and it was for the sole purpose of adjourning the already fixed trial date and to cause injustice and prejudice to the plaintiffs.

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Held, dismissing the appeal:

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(1) The delay on the part of the respondent in setting down the action for trial was no excuse for the appellant to delay the application for the amendment of his defence at a very late stage without placing sufficient material before the court and to give cogent reasons thereof. An application for amendment of a writ or pleadings is not as a matter of a right of a party but is left to the judicial discretion of the court depending on the circumstances of each case (see p 55E–F).

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(2) The court agreed with the High Court's conclusion on the lack of bona fide on the part of the appellant in his application. The court was satisfied that on the affidavit evidence there was insufficient material placed before him and even if there was sufficient material no cogent reasons were advanced by the appellant. The judge had correctly exercised his judicial discretion in dismissing the application which borders on lack of bona fide (see p 56A–B).

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[Bahasa Malaysia summary

Perayu telah membuat rayuan terhadap perintah hakim yang menolak permohonan beliau untuk meminda pernyataan pembelaan beliau. Perayu telah mendepos di dalam afidavit beliau yang menyokong permohonan tersebut bahawa kelewatan permohonan beliau adalah disebabkan, antara lain, keperluan untuk membuat perbandingan dan pengesahan salinan dokumen kepada dokumen asal yang disimpan di

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luar negara. Responden menghujahkan bahawa terdapat kelewatan yang tidak dapat dimaafkan dan melampau di pihak perayu dalam memfailkan permohonan tersebut dan ia hanya bertujuan untuk menangguh tarikh perbicaraan yang telahpun ditetapkan dan menyebabkan ketidakadilan dan prejudis kepada plaintif-plaintif.

Diputuskan, menolak rayuan tersebut:

(1) Kelewatan di pihak responden dalam menetapkan tindakan untuk perbicaraan bukan satu alasan untuk perayu melewatkan permohonan untuk meminda pembelaan beliau di peringkat yang paling akhir tanpa mengemukakan material yang mencukupi di hadapan mahkamah dan memberikan sebab-sebab yang meyakinkan. Satu permohonan untuk meminda satu writ atau pliding bukan satu hak yang nyata satu pihak tetapi terpulang kepada budi bicara kehakiman mahkamah yang bergantung kepada keadaan setiap kes (lihat ms 55E–F).

(2) Mahkamah bersetuju dengan kesimpulan Mahkamah Tinggi mengenai bona fide yang tidak mencukupi di pihak perayu dalam permohonan beliau. Mahkamah berpuas hati bahawa keterangan afidavit tidak mengemukakan material yang mencukupi dan walaupun terdapat material yang mencukupi tiada sebab-sebab yang meyakinkan yang telah dikemukakan oleh perayu. Hakim telah menggunakan budi bicara kehakiman beliau dengan betul di dalam menolak permohonan tersebut yang mempunyai batas bona fide yang tidak mencukupi (lihat ms 56A-B).]

Notes

For cases on amendment of defence, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 308–318.

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (refd)

Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors [1992] 2 SLR 793; [1993] 2 SLR 113 (refd)

Taisho Co Sdn Bhd & Anor v Pan Global Equities Bhd [1999] 1 MLJ 359 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5, O 34

Appeal from: Civil Suit No S2–23–42 of 1996 (High Court, Kuala Lumpur)

A *C Abraham* (*Muhammad Shafee bin Md Abdullah* and *G Rajasingam* with him) (*Shafee & Co*) for the appellant.

V Sivaparanjothi (*S Rutheran* and *S Asholvijay* with him) (*V Siva & Partners*) for the respondents.

Haidar JCA. (delivering judgment of the court): This appeal is against the B order of the learned judge who dismissed the appellant's application to amend his statement of defence. It is Civil Appeal No W–02–720–99. There are two other appeals filed by the appellant. They relate to the issue of the amendment of the appellant's statement of defence. They are Civil Appeal Nos W–02–787–99 and W–02–788–99.

C With the agreement of counsel for both parties we directed the parties to proceed with Civil Appeal No W–02–720–99. Counsel for the appellant, however, intimated to us that the other two appeals be put on hold pending the outcome of the present appeal. Apparently, he felt that his client should not be prejudiced in the event he failed in the present appeal. We agreed to the stand taken by him.

D On 23 September 2000, we allowed the appeal in part but dismissed the appeal with costs on the ground of lack of bona fide of the appellant's application.

Cik Gurmit Kaur Sidhu, counsel for the appellant, on behalf of the senior counsel, Mr Cecil Abraham, who, we were told, was away overseas, E prayed for adjournment of Civil Appeal Nos W–02–787–99 and W–02–788–99 to seek instructions. Dato' Sivaparanjothi, counsel for the respondents, did not object and we adjourned these two appeals to a date to be fixed. We now proceed to give our reasons.

The application of the appellant for the amendment of his statement of F defence arose out of Civil Suit No S2–23–42–1996 initiated by the respondents against the appellant for damages premised upon alleged slander and libel arising from a publication in the *International Commercial Litigation Magazine* issue for November 1995 entitled 'Malaysian Justice on Trial'.

G Before the hearing of this appeal, there is a motion filed by the appellant on 8 March 2000 praying:

(1) that the appellant be granted an extension of time from 16 November 1999 up to seven days from the hearing on this application to file and serve a supplementary record of appeal in this appeal incorporating a certified true copy of the order dated 8 September 1999 granted by the H High Court of Malaya at Kuala Lumpur and under appeal herein and the documents within the common agreed bundle of documents marked as 'CABD–3' filed in the High Court;

(2) that the costs of this application be ordered to be costs in the cause;

I (3) such further or other relief as this honourable court may deem fit, just and appropriate.

It is supported by the affidavit of the appellant.

In respect of the first part of prayer (1), ie the inclusion of the order dated 8 September 1999 by way of a supplementary record of appeal, counsel for the respondents had no objection. However, in respect of the second part of prayer (1) ie the inclusion of 'CABD–3', counsel for the respondents objected.

We allowed the first part of prayer (1) but disallowed the second part thereof.

We ordered the costs of the application to follow the event of this appeal.

In order to appreciate the bona fide issue, a brief chronology of events would be helpful and it is set out hereunder:

The law

13.6.96	Respondents' writ and statement of claim filed in court.
9.9.96	Appellant's statement of defence filed and served.
23.9.96	Respondents' reply to the statement of defence filed and served.
19.3.99 } 20.5.99 } 7.6.99 }	Case management dates before the learned judge.
13.8.99	Oral application made by the appellants' counsel for the learned judge to recuse himself from hearing and determining this action.
30.8.99	Oral application to disqualify the judge dismissed and stay pending appeal refused. This decision formed the subject matter of Court of Appeal Civil Appeal No W–02–662–99 which was dismissed on 19 July 2000. This is now the subject matter of Federal Court Civil Application No 08–57–2000(W).
1.9.99	The appellant's application by way of summons in chambers dated 1 September 1999 (encl 40) seeking to amend the prayers within the appellant's summons in chambers dated 21 August 1999 was called for hearing. This application was dismissed by the learned judge with costs. This decision now forms the subject matter of Civi Appeal No W–02–788–99. Following from the above, the court then proceeded to hear encl 31A (the appellant's summon in chambers dated 21 August 1999. By encl 31A, the appellant was seeking leave to amend defence filed in the action. The appellant's counsel's oral application to amend the prayer therein was rejected by the court and the court proceeded to dismiss encl 31A. This decision now forms the subject matter of Civil Appeal No W–02–787–99.
3.9.99	Following from the decision given on 1 September 1999 and following from the fact that the appellant's application to amend his defence had been dismissed on purely technical grounds, the appellant filed a fresh application to amend his defence, ie by way of summons in chambers dated 3 September 1999 (encl 43).

6.9.99.	The trial commenced. The appellant's counsel made applications for adjournment, one of which was on the grounds that encl 43 be heard and determined prior to the commencement of trial. Those applications were refused and the trial commenced.
7.9.99	The trial continued. In the course of the cross-examination of the respondents' third witness it became apparent to the court that it was necessary for the application to amend to be heard and disposed of first and as such, the court directed that encl 43 be fixed for hearing on 8 September 1999.
8.9.99	Encl 43 was heard and it was dismissed with costs. This now forms the subject matter of Court of Appeal Civil Appeal No W–02–720–99 (the present appeal).

The provision relating to amendment of the writ and pleadings is governed by O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). It is trite that amendments can be made at any stage of the proceedings including at the trial. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. It is equally trite that if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, the apex court of this country, had the occasion to consider and interpret O 20 r 5 of the RHC. It is the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 where the Federal Court set out three basic questions for consideration, viz:

(1) whether the application was bona fide;

(2) whether the prejudice caused to the other side can be compensated by costs; and

(3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

As we are here dealing with the application for the amendment of defence, question (1) above would be relevant for consideration. If it is allowed, it follows that the other party should be compensated by costs.

This court similarly had considered O 20 r 5 of the RHC in *Taisho Co Sdn Bhd & Anor v Pan Global Equities Bhd* [1999] 1 MLJ 359. In *Taisho*'s case, the amendments relate to the amendment of the statement of claim. Be that as it may, the questions posed in *Yamaha* would still be equally applicable to the present appeal before us. If the application of the appellant, on the facts before the learned judge, showed lack of bona fide then he fails in his application altogether. It is then for the appellant asking the court to exercise a discretionary power in his favour to place some material and advance some cogent reasons to impel the court to lean on his side (see *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793; [1993] 2 SLR 113).

The learned judge in his judgment at p 45 of the appeal record ruled 'There is total lack of merit in this application which lacks bona fide'. Lack

of bona fide or put it another way, mala fide is very much a ground in considering an application for amendment under O 20 r 5 of the RHC (see also *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230). We then need to examine the material placed before him and whether cogent reasons were advanced by the appellant for the court to exercise its discretionary power in his favour.

Bona fide issue

The application of the appellant is supported by his own affidavit (pp 336–338 of the appeal record). On the delay in making the application to amend the defence, this is what he, inter alia, deposed at para (b) of his affidavit:

> The delay in making this application to amend the defence is attributable to the need to make careful comparisons and confirmation of the copies of the documents (related to the evidence in relation to the defences of justification and the plea of qualified privelage) to the original documents. For purposes of safekeeping some of the copies of the documents were kept overseas making access more difficult and slow. The need to make careful assessment of these documents before considering them as evidence to the pleas stated are obvious as the defences already raised earlier, especially on justification are rather serious in the light of the controversy relating to the judiciary... .
>
> Moreover, there was also a need to confirm and confer some of these documents with the intended witnesses, who are in the country and abroad, confirmation of which has only recently been done as various official and non-official agencies are involved in certain on-going related investigations.

At para 11 thereof, he deposed:

> I am advised by my solicitors and verily believe and state that these proposed amendments to the defence is bona fide without malice and that based on para 10 above, the plaintiffs will not be prejudiced in any manner that cannot be compensated by costs.

The respondents, through the affidavit of Wong Gian Kim, responded rather strongly on the material placed before the court and the reasons given for the delay by the appellant. Wong Gian Kim, inter alia, states in his affidavit:

> 8(e) further the purported particulars of justification sought to be pleaded under para 15 of the proposed amended defence namely paras 15.1 to 15.27 relate to matters which allegedly took place in 1994 and 1995 and it is not understood as to why the defendant had not pleaded the same in his original defence which was filed on 9 September 1996 (one year later);
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> (f) the said application was filed on 2 September 1999 or 3 September 1999 just three days before the trial of the action which commenced on 6 September 1999 for the sole purpose of adjourning the already fixed trial date and to cause grave injustice and prejudice to the plaintiffs. This is evident from the facts stated in para 8(e) above;
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> 9(c) the defendant's explanation that the delay is attributable to the need to make comparisons and confirmation of the copies of the document to the

A original documents are mere allegations not supported by evidence. In any event a defendant does not take more than three years just to compare and confirm documents; (d) it does not take more than three years to compare and confirm documents just because they are alleged to be kept overseas unless the place in which the documents are kept is inaccessible by modern transportation;

B (e) similarly it does not take a defendant more than three years to to make assessment of documents …

(g) it also does not take more than three years to confirm and confer documents with intended witnesses and the deponent of the said affidavit had not disclosed the alleged 'various official and non-official agencies' and the 'certain on going related investigations'…

C 11(d) Therefore there is an inexcusable and inordinate delay on the part of the defendant in filing the said application. As stated in para 9 above, the purported reason for the delay in filing the said application as stated in the said affidavit are wholly misconceived and untenable in law. This is a clear tactical manoeuvre by the defendant to delay and derail the trial of this action by filing an application at such a late stage of the proceedings

D to the serious detriment and prejudice of the plaintiffs

Mr Cecil Abraham, counsel for the appellant, argued that the respondents themselves were guilty of delay by not taking early steps to set down the action for trial. It may well be true as the pleadings are deemed closed in early October 1996 and the respondents issued notice to set the matter

E down for trial only on 6 January 1999. However, in our view, it is open to the appellant to move the court for the necessary steps to be taken by the respondents failing which to apply to the court for the action to be dismissed for want of prosecution under O 34 of the RHC. With respect, this is no excuse for the appellant to delay the application for the amendment of his

F defence at a very late stage without placing sufficient material before the court and to give cogent reasons thereof. It should be noted that an application for amendment of a writ or pleadings is not as a matter of a right of a party but is left to the judicial discretion of the court depending on the circumstances of each case. In dealing with the amendment to the defence, we would quote a passage from *Gatley on Libel* (9th Ed,1998) under the

G caption '*Granting of leave in discretion of court*' at p 447:

> … the court has shown itself reluctant to grant a defendant leave to amend his defence where the application is made late in the day, either at, or close to, the trial; (*Plummer v Charman & Ors* [1962] 1 WLR 1469 (CA)), in particular, when he seeks to introduce a plea of justification at a late stage, the

H defendant's conduct will be closely inquired into, and the court will expect him to have shown due diligence in making his inquiries and investigations (*Associated Leisure Ltd (Phonographic Equipment Co Ltd) & Ors v Associated Newspapers* [1970] 2 QB 450 (CA)). It has been held that where delay has been due to the defendant's own default in some respect, that circumstance should be taken into consideration by the judge as part of the matters to be

I weighed in deciding whether or not to allow an amendment. The mere fact that delay may be capable of being compensated in money is not conclusive of the question whether the amendment should or should not be permitted (*Bower v Maxwell*, unreported, 8 May 1989, 89/472 (CA)).

We may not wholly agree with the approach the learned judge took in dealing with the application when he asked the appellant's counsel to address him on five issues. With respect, he should be guided by the principle set out in the *Yamaha* case. We may also not totally agree with his reasons on the bona fide issue. However, we agree with his conclusion on the lack of bona fide on the part of the appellant in his application. We were satisfied that on the affidavit evidence there was insufficient material placed before him and even if there was sufficient material no cogent reasons were advanced by the appellant. The learned judge had, in our view, correctly exercised his judicial discretion in dismissing the application which borders on lack of bona fide. If the appellant fails on this ground, he fails altogether.

There were no compelling grounds for us to interfere with the exercise of his discretion with the exception of the amendment to the title, rewording of the parties and paras 3.1 and 3.3, where we allowed them as they are merely formal. However, the appeal was dismissed with costs. The deposit to go to the respondents towards their taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar